Wisma Denmark Sdn Bhd v Landcorp Finance Bhd

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO S4–24–183 OF 2006
TENGKU MAIMUN JC
12 MARCH 2007

Contract — Breach — Time of the essence — Whether conditions precedent fulfilled

Contract — Undue Influence — Agreement for sale and purchase of land — Whether contract was entered into under undue influence, unconscionable conduct and constructive fraud

The plaintiff is the registered owner of two pieces of property. The properties were charged to Danaharta Managers Sdn Bhd as security for loans. Danaharta demanded payment of the outstanding sum of RM20,500,000 failing which it would foreclose the second property. The plaintiff decided to sell the first property to settle the outstanding amount owing. Negotiations were entered into by the plaintiff with one Raj Kumar who represented to be a director of the defendant. A sale and purchase agreement was prepared by the defendant's solicitors and executed by the plaintiff. Raj Kumar paid the plaintiff SGD$500 for signing the sale and purchase agreement. The plaintiff contended that the sale and purchase agreement did not correctly record the purchase price of the first property and a supplementary agreement was executed to resolve this. The sale and purchase agreement provided for conditions precedent that the defendant should obtain approval of its Board of Directors within one month and for the approval by the Foreign Investment Committee. The plaintiff contended that the deadline for payment of monies passed and no consideration was paid for the purchase and the conditions precedent were not fulfilled. The plaintiff contended that the defendant had taken advantage of the fact that the plaintiff was under pressure to settle the outstanding amount and alleged lack of transparency and authority, lack of consideration, undue influence, unconscionable conduct and constructive fraud. The plaintiff filed this originating summons seeking a declaration that the sale and purchase agreement, the procurement agreement and the supplementary agreement entered into between the plaintiff and the defendant were void, voidable ab initio and invalid and for judgment to be entered against the defendant for damages to be assessed.

Held, allowing the plaintiff's claim:

(1) The deponent of the defendant's affidavit averred that on 28 September 2005, the defendant's Board of Directors' had given approval for the entry into the sale and purchase agreement and the acquisition of the properties which purported approval was not however exhibited. The glaring omission by the

defendant to exhibit the purported approval in the court view lends proof to the plaintiff's case that the condition precedent was not fulfilled in respect of the defendant's Board of Directors' approval (see paras 21 & 23).

(2) In this case time was of the essence and the approval of the defendant's Board of Directors and the Foreign Investment Committee were the conditions precedent which had not been fulfilled (see para 26).

(3) The payment of RM1,100 by the defendant did not form the required consideration for the purchase of the properties worth more than RM150,000,000. The terms and conditions of the agreements were clearly imbalanced, the effect of the various provisions was that the defendant would get the two properties belonging to the plaintiff with no cost at all except for the RM1,100 whereas the plaintiff would be deprived of both properties for a meagre RM1,100. That in itself showed undue advantage and for want of consideration, the agreements were void under s 26 of the Contracts Act 1950 (see para 27).

[Bahasa Malaysia summary

Plaintif merupakan pemilik berdaftar dua keping hartanah. Hartanah tersebut telah dicagarkan kepada Danaharta Managers Sdn Bhd sebagai sandaran untuk pinjaman. Danaharta menuntut pembayaran baki jumlah RM20,500,000 yang sekiranya gagal akan berlaku halang tebus ke atas hartanah kedua. Plaintif memutuskan untuk menjual hartanah pertama untuk menyelesaikan baki jumlah terhutang. Rundingan diadakan oleh plaintif dengan Raj Kumar yang memperkenalkan diri sebagai pengarah defendan. Satu perjanjian jual beli telah disediakan oleh peguam defendan dan disempurnakan oleh plaintif. Raj Kumar telah membayar plaintif SGD$500 untuk menandatangani perjanjian jual beli tersebut, Plaintif menegaskan bahawa perjanjian jual beli tersebut tidak merekodkan harga belian hartanah pertama dengan betul dan satu perjanjian tambahan telah disempurnakan untuk menyelesaikan perkara ini. Perjanjian jual beli tersebut memperuntukkan pra syarat agar defendan hendaklah mendapat kelulusan Lembaga Pengarahnya dalam tempoh satu bulan dan mendapat kelulusan oleh Jawatankuasa Pelaburan Asing. Plaintif menegaskan bahawa tarikh akhir untuk pembayaran wang telah luput dan tiada balasan telah dibayar untuk belian dan pra syarat tidak dipenuhi. Plaintif menegaskan bahawa defendan telah mengambil peluang ke atas fakta yang plaintif tertekan untuk menyelesaikan baki jumlah dan mengatakan tiada ketelusan dan kuasa, kurang pertimbangan, pengaruh tidak wajar, tindakan yang tidak wajar dan fraud yang konstruktif. Plaintif telah memfailkan saman pemula ini memohon satu deklarasi bahawa perjanjian jual beli tersebut, perjanjian pemerolehan dan perjanjian tambahan telah disempurnakan antara plaintif dan defendan adalah terbatal, boleh dibatalkan ab initio dan tidak sah dan agar penghakiman dimasukkan terhadap defendan untuk ganti rugi yang perlun ditaksirkan.

Diputuskan, membenarkan tuntutan plaintif:

(1) Deponen afidavit defendan menegaskan bahawa pada 28 September 2005, Lembaga Pengarah defendan telah memberikan kelulusan untuk memasuki

perjanjian jual belindan pemerolehan hartanah-hartanah yang dikatakan telah diluluskan bagaimanapun tidak diekshibitkan. Peninggalan ketara oleh defendan untuk mengekshibitkan kelulusan yang dimaksudkan itu pada pendapat mahkamah menunjukkan bukti kepada kes plaintif bahawa pra syarat tersebut tidak dipenuhi berkaitan kelulusan Lembaga Pengarah defendan (lihat perenggan 21 & 23).

(2) Dalam kes ini masa adalah inti pati dan kelulusan Lembaga Pengarah defendan dan Jawatankuasa Pelaburan Asing adalah pra syarat yang tidak dipenuhi (lihat perenggan 26).

(3) Pembayaran RM1,100 oleh defendan tidak membentuk balasan yang dikehendaki untuk pembelian hartanah yang melebihi RM150,000,000. Terma dan syarat perjanjian-perjanjian tersebut jelas tidak seimbang, kesan pelbagai peruntukan adalah bahawa defendan akan mendapat dua hartanah milik plaintif tanpa sebarang kos kecuali untuk RM1,100 di mana plaintif akan terkilan terhadap kedua-dua hartanah untuk RM1,100 sahaja. Itu sahaja menunjukkan kelebihan yang tidak wajar dan untuk balasan, perjanjian-perjanjian tersebut adalah terbatal di bawah s 26 Akta Kontrak 1950 (lihat perenggan 27).]

Notes

For cases on time of the essence, see 3(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 2720–2730.

For cases on undue influence of agreement for sale and purchase of land, see 3(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 5460–5461.

Cases referred to

Credit Lyonnais Bank Nederland NV v Burch [1997] 1 All ER 144 (refd)

Jaafar bin Ibrahim v Gan Kim Kin [1985] 2 MLJ 24 (refd)

Kumarasamy a/l Sengainy & Ors v Revathy Development (M) Sdn Bhd [1995] 2 MLJ 586 (refd)

Omar bin Mat Ziki v Mokhtar bin Amin [1996] 2 MLJ 687 (refd)

Legislation referred to

Contracts Act 1950 s 36(1)
Specific Relief Act 1950 s 27

(David Lingam & Co) for the plaintiff.

Harjinder Kaur (Sharon and J Sharma with her) (Shahrizat Rashid & Lee) for the defendant.

Tengku Maimun JC:

[1] By the originating summons the plaintiff is seeking for an order or declaration that the sale and purchase agreement dated 10 September 2005, the procurement agreement dated 10 September 2005 and the supplementary agreement dated 21 September 2005 ('the agreements') entered into between the plaintiff and the

defendant are void and/or voidable ab initio and invalid and for judgment to be entered against the defendant for damages to be assessed and costs. A

[2] The plaintiff's application was supported by an affidavit affirmed by the Chairman, Tan Sri Ibrahim bin Mohamed (encl 7) deposing to the background facts and circumstances leading to the execution of the agreements. The plaintiff is the registered owner of a piece of land with an office building known as Wisma Denmark situate at 86, Jalan Ampang, Kuala Lumpur held under Grant 45110 Lot 55 Section 45 approximately valued at RM135,000,000 ('the first property') and five pieces of vacant land within the vicinity of the first property approximately valued at RM30,000,000 held under Grant 12371, Grant 27736, Grant 27733, Grant 4488 and Grant 9940 respectively, all in Section 45, Town of Kuala Lumpur ('the second property'). The first property and the second property will hereinafter be referred to as 'the properties'. B C

[3] Prior to September 2005, the properties were charged to Danaharta Manager Sdn Bhd ('Danaharta') as collateral for loans taken by the plaintiff since 1996. By a letter dated 15 July 2005, Danaharta demanded that the plaintiff settle an amount of RM20,500,000 (the outstanding amount) by 31 August 2005 failing which it would foreclose the second property. Due to the plaintiff having difficulty raising the required funds within the short time frame, an extension was asked for by the plaintiff and was granted by Danaharta until 30 September 2005 (exhs TSI 3 and TSI 4 encl 6). D E

[4] To avoid foreclosure of the second property and it having tremendous development potential, the Plaintiff decided to sell the first property at its market value of about RM135,000,000 and after repayment of a loan on the first property amounting to approximately RM40,000,000 use its balance sale proceeds to settle the outstanding amount owing on the second property. The idea is to enable the plaintiff to retain the second property free of encumbrance and with the surplus funds, to develop it to its full potential. F

[5] In mid-2005 the plaintiff was introduced by one Encik Abdul Aziz bin Abdullah form the Maybank Group to Raj Kumar as one of the two brothers known as 'the Royal Brothers' from Singapore. Raj Kumar represented himself to be the Director of the defendant which is a company registered in the British Virgin Islands (BVI). G

[6] On 9 September 2005 Raj Kumar met Tan Sri Ibrahim, at the latter's office at Wisma Denmark and had expressed an intention to purchase the properties. The plaintiff was offered RM135m for the first property and RM21m for the second property together with 30% of the profits from the redevelopment of the second property. At the meeting Raj Kumar had represented to Tan Sri Ibrahim the ability and financial strength of himself and the defendant and that they were successful, reputable and international class property developers. Raj Kumar proposed the plaintiff to execute a formal sale and purchase agreement for the properties with the defendant so that he could approach banks to secure financing in order to clear the outstanding amount and at material times it was open to the plaintiff to source and H I

obtain offers from third parties (exh TSI 11 encl 7). Tan Sri Ibrahim avers that an assurance was given by Raj Kumar that the plaintiff would not require the services of a lawyer and at all material times, he had full trust in Raj Kumar and the representations made.

[7] On 10 September 2005 Raj Kumar attended Tan Sri Ibrahim's office with Ms Loo May Pearl from the law firm of Messrs Shahrizat Rashid & Lee ('the defendant's solicitors') who was to prepare the agreement. The sale and purchase agreement was accordingly prepared by the defendant's solicitor and was signed by Tan Sri Ibrahim's daughter, Aishaf Falina bte Ibrahim on behalf of the plaintiff and Kishin Hiranandani, the son of Raj Kumar on behalf on the defendant at almost midnight on 10 September 2005 (exh TSI 2 encl 7). Raj Kumar paid the plaintiff SGD$500 which is equivalent to approximately RM1,100 for signing the sale and purchase agreement. At the same time the procurement agreement was also signed (exh TSI 7 encl 7).

[8] The plaintiff avers that the sales and purchase agreement did not correctly record the purchase price of the first property as RM135,000,000 but as RM105,000.000 and the RM135,000,000 was stated to be the consideration for both properties. This led to the discussion with Raj Kumar whereupon a supplementary agreement was prepared by the defendant's solicitor and signed by the parties on 21 September 2005. This time a sum of RM10 was to be paid by the defendant to the plaintiff as consideration which sum was actually never paid (exh TSI 9 encl 7).

[9] The sale and purchase agreement provided for condition precedent ie within one month of the date of the agreement, the defendant shall obtain the approval from its Board of Directors of the entry into the Agreement and the acquisition of the properties and there is also a condition precedent for the approval by the Foreign Investment Committee (cll 2(f) and 2.1.2 exh TSI 2 encl 7). Similar provisions were also contained in the supplemental agreement (cl 7.2.1.4 exh TSI 9 encl 7).

[10] The supplementary agreement further provided that the first property was to be transferred to a new joint venture company to be set up by Raj Kumar (Newco 1). Newco 1 would raise sufficient funds by mortgaging the first property to financial institution to pay off the first property's existing loan of RM40,000,000. The remaining balance of RM95,000,000 of the purchase price would be in the form of Redeemable Convertible Preference Shares in Newco 1 to be issued to the plaintiff. Newco 1's capital and equity structure was a nominal RM1,000 reflecting 1,000 shares of RM1 par value, 70% of which would be issued in favour of the defendant and the balance 30% to the plaintiff (cl 4.2 and Annexure 1 exh TSI 9 encl 7).

[11] The sale and purchase agreement also provided that all rental proceeds in respect of the tenancies in Wisma Denmark would go the defendant as all existing tenancies would have to be assigned to the defendant and any fresh tenancies would have to be executed in favour of the defendant (cl 4.1 (v) exh TSI 2 encl 7).

[12] The second property was also to be transferred to a joint venture company (Newco 2) and instead of the plaintiffs getting RM21,000,000 for the lands, they were to get Redeemable Convertible Preference Shares in lieu of the cash. The shares could only be converted into cash if Newco 2 made sufficient profits from the redevelopment of the second property. It was further provided that the revenue from the redevelopment was to pay off all the debts of Newco 2 and Newco 1. Newco 2 is again controlled and owned by Raj Kumar with a meagre paid up capital of RM1,000 (cl 5 and Annexure 1 exh TSI 9 encl 7).

[13] The sale and purchase agreement also provided that the Plaintiff was to give various forms of security to guarantee a seven-year yield of 8% per anum on RM135,000,000 although the consideration of the first property was stated as RM105,000,000 (cl 2.1.1(e) exh TSI 2 encl 7). Under the supplementary agreement, the plaintiff was required to maintain the yield guarantee as described above in favour of the Defendant although the first property was to be transferred to Newco 1; plaintiff was to pledge 51 % shares of their paid up capital in TSI Holdings Sdn Bhd ('TSIHSB'); assign all dividends to be derived from 75% of the equity held by the plaintiff in TSIHSB; assign the rental proceeds of approximately RM250,000 per month for two plots belonging to Fawanis Sdn Bhd, a family owned company of Tan Sri Ibrahim; the appointment of a nominee of Raj Kumar to the Board of Fawanis with a golden share with full veto rights over shareholders and board decisions and the plaintiff was to place a cash deposit of RM7m with the defendant (cl 7 exh TSI 9 encl 7).

[14] Clauses 1.1 and 2.1 of the procurement agreement provided that in consideration of the defendant's endeavour to obtain facility from the financier, the plaintiff shall pay the defendant the procurement fees of 2.5% of RM21,000,000 (exh TSI 7 encl 7).

[15] In the event of default of performance by the plaintiff, there was a provision for liquidated damages against the plaintiff but similar provision was absent against the defendant (cll 15 and 16 exh TSI 2 encl 7).

[16] The dateline 30 September 2005 passed by and no monies were forthcoming from the defendant. The outstanding amount to Danaharta was then settled by the plaintiff through monies borrowed from family members. Only then did the plaintiff become suspicious of the defendant's intentions and representations and the plaintiff then sought legal advice. It turned out that Raj Kumar was an ex-convict having served an imprisonment sentence in Singapore for criminal breach of trust in 1999 (exh TSI 13 encl 7). A police report was lodged by Tan Sri Ibrahim's daughter on 5 December 2005 and subsequently on 3 February 2006 this action was brought against the defendant.

[17] It is the contention of the plaintiff that the defendant had taken advantage of the fact that plaintiff was under pressure to settle the outstanding sum and the learned counsel for the plaintiff in his submission raised inter alia the issues of lack of transparency and authority; lack of consideration; non-fulfillment of condition precedent and undue influence and unconscionable conduct and constructive fraud.

There is, submitted learned counsel for the plaintiff, a cloud of secrecy concerning the defendant which is declared to be a company registered in the BVI. No company search could be done, the directors or shareholders are not known; neither is the paid up or authorized capital of the defendant. Hence the learned counsel submitted that the very existence of the defendant company is in question since it could very well be a phantom company.

[18] Learned counsel for the plaintiff further submitted that there was absolutely no consideration paid for the purported purchase. Citing the case of *Omar bin Mat Ziki v Mokhtar bin Amin* [1996] 2 MLJ 687, the learned counsel for the plaintiff submitted that the agreements entered into between the plaintiff and the defendant are void and unenforceable pursuant to s 26 of the Contracts Act 1950.

[19] As regards the non-fulfillment of the conditions precedent, learned counsel for the plaintiff contended that since time is of the essence, the agreements are void and of no effect on the authority of *Kumarasamy a/l Sengainy & Ors v Revathy Development (M) Sdn Bhd* [1995] 2 MLJ 586.

[20] On fraudulent intentions and unconscionable conduct, learned counsel for the plaintiff cited the procurement agreement where the plaintiff was to pay the defendant a procurement fees of 2.5% of RM21,000,000 which is an extraordinary scheme of the defendant extracting RM525,000 from the plaintiff for doing what the defendant is expected to do as any purchaser of a property. The learned counsel for the plaintiff also submitted that pursuant to s 27 of the Specific Relief Act 1960 specific performance of the Agreements could not be enforced against the plaintiff.

[21] In response to the plaintiff's claim the defendant filed an affidavit in reply (encl 15A) affirmed not by Raj Kumar the person who had been in discussion with Tan Sri Ibrahim but one Kishin Hiranandani, purported to be the director of the defendant. Vide para 5 of encl 15A the deponent avers that on 28 September 2005, the defendant's Board of Directors' had given approval for the entry into the sale and purchase agreement and the acquisition of the properties which purported approval was not however exhibited. The defendant denies the plaintiff's allegation on the undue influence and the representation that the plaintiff need not require services of a solicitor but admitted to the payment of RM1,100 as the consideration for the sale and purchase agreement and to the consideration of RM10 for the supplementary agreement. Vide para 6 of encl 15A the defendant counter claimed for the specific performance of the agreements.

[22] The learned counsel for the defendant in her submission inter alia cited the case of *Credit Lyonnais Bank Nederland NV v Burch* [1997] 1 All ER 144 which laid down the circumstances to prove unconscionable bargain ie poverty and ignorance; sale at an undervalue and the disadvantaged party is deprived from any independent advice, which circumstances contend learned counsel, are absent in the instant case.

[23] Having regard to the surrounding facts and circumstances of this case, it is my view that in totality the plaintiff has proven its claim against the defendant. The glaring omission by the defendant to exhibit the purported approval in my view

lends proof to the plaintiff's case that the condition precedent is not fulfilled in respect of the defendant's Board of Directors' approval.

[24] In so far as the approval of the Foreign Investment Committee is concerned, although there has been no application made by the defendant pursuant to the agreements, the plaintiff did write to the Foreign Investment Committee on 31 October 2006 enclosing the pertinent documents relating to the proposed sale of the properties to the defendant whereupon the Foreign Investment Committee rejected the application vide its letter dated 3 November 2006.

[25] In the case of *Jaafar bin Ibrahim v Gan Kim Kin* [1985] 2 MLJ 24 time was not merely of the essence of the contract but fulfilment of the promise by the appellant to obtain the approval of the State Authority for conversion and sub-division of the land on or before 31 December 1977 was a condition precedent of the whole contract. Since the event had not happened by the dateline the contract was held by the Supreme Court to be void under s 36(1) of the Contracts Act 1950.

[26] Similarly in this case time was of the essence (cl 20 exh TSI 2 encl 7) and the approval of the defendant's Board of Directors and the Foreign Investment Committee were the conditions precedent which have not been fulfilled.

[27] I find that the payment of RM1,100 by the defendant do not form the required consideration for the purchase of the properties worth more than RM150,000,000. The terms and conditions of the agreements are clearly imbalanced, the effect of the various above-quoted provisions is that the defendant would get the two properties belonging to the plaintiff with no cost at all except for the RM1,100 whereas the plaintiff would be deprived of both properties for a meagre RM1,100. In my view, that in itself shows undue advantage and for want of consideration, I hold that the agreements are void under s 26 of the Contracts Act 1950.

[28] Based on the foregoing the plaintiff's application is allowed with costs. As for the defendant's counter claim for specific performance, the answer is found in s 27 of the Specific Relief Act 1950 which provides:

> Specific performance of a contract cannot be enforced against a party thereto in any of the following cases:
>
> (a) if the consideration to be received by him is so grossly inadequate, with reference to the state of things at the date of the contract, as to be either by itself or coupled with other circumstances evidence of fraud or of undue advantage taken by the plaintiff;
>
> (b) if his assent was obtained by the misrepresentation (whether wilful or innocent), concealment, circumvention, or unfair practices, of any party to whom performance would become due under the contract, or by the promise of any party which has not been substantially fulfilled; or
>
> (c) if his assent was given under the influence of mistake of fact, misapprehension, or surprise.

[29] Clearly the instant situation falls under para (a). Hence pursuant to s 27 above-mentioned, the defendant's counter claim is dismissed with costs.

Plaintiff's claim allowed.

Reported by Brendan Navin Siva